

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JULIUS BRADFORD,

Petitioner,

v.

WILLIAM GITTERE, *et al.*,

Respondents.

Case No. 2:13-cv-01784-RFB-EJY

ORDER

I. Introduction

This action is a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 by Julius Bradford, a Nevada prisoner. Bradford is represented by appointed counsel. He is serving what in the aggregate amount to life prison sentences with the possibility of parole after forty years, on convictions in Nevada's Eighth Judicial District Court (Clark County) for murder with use of a deadly weapon and attempted robbery with use of a deadly weapon. The merits of Bradford's Second Amended Habeas Petition are before the Court, as well as his Motion for an Evidentiary Hearing. In this order, the Court grants Bradford's Motion for an Evidentiary Hearing on Ground 2 of his Second Amended Petition and denies the Motion without prejudice as to Bradford's other claims. The Court will revisit the Motion for Evidentiary Hearing when addressing Bradford's remaining claims on the merits and will schedule the evidentiary hearing.

II. Background

The following facts are as described in the Second Amended Petition:

1 On the morning of June 8, 2003, Benito Zambrano-Lopez was
2 walking toward a grocery store near his house [in Las Vegas]. He had just
3 over \$100 cash on him and he was wearing a watch. Tyrone Williams, a
4 sixteen-year old, approached Mr. Zambrano-Lopez and started a fight. Two
5 of Mr. Williams' friends, Steven Perry, a seventeen-year old, and
6 Mr. Bradford, who had just turned eighteen, were walking nearby. At some
7 point, they both stepped in to assist Mr. Williams, who was losing the fight.
8 Soon afterward, Mr. Williams pulled out a gun and shot Mr. Zambrano-
9 Lopez four times. Mr. Bradford and Mr. Perry ran away immediately after
10 the first shot was fired, and Mr. Williams followed soon after. None of
11 Mr. Zambrano-Lopez's belongings, including the cash or his watch, were
12 taken from him. Mr. Zambrano-Lopez died the next day, and the state
13 charged Mr. Bradford with felony murder.

14 * * *

15 Only one eyewitness testified at trial. Tracy Jimenez testified that she
16 was walking down the street with her young daughter when she saw the
17 three men surround Mr. Zambrano-Lopez, hitting and kicking him. She said
18 that Mr. Zambrano-Lopez fought back to defend himself. She testified that
19 Mr. Williams then pulled out a gun and shot Mr. Zambrano-Lopez, while Mr.
20 Bradford and Mr. Perry immediately fled. At the preliminary hearing, Ms.
21 Jimenez testified she did not see the men try to take anything from Mr.
22 Zambrano-Lopez. At trial five years later, she testified that, after Mr.
23 Bradford had fled, Mr. Williams "pat[ted]" down Mr. Zambrano-Lopez's
24 body.

25 Two other state's witnesses provided equivocal testimony about
26 what they heard Mr. Williams and Mr. Perry say about the murder. Neither
27 testified that Mr. Bradford said anything about it. Chetique Vercher testified
28 that after the shooting, she was in the same house as
29 Mr. Williams, Mr. Perry, and Mr. Bradford. She testified that the crime was
30 "supposed to be robbery," but did not say that she actually heard anyone
31 say that. She also testified that she heard Mr. Perry say that Mr. Bradford
32 had told Mr. Williams to shoot Mr. Zambrano-Lopez. Nelson Rodgers, a
33 friend of Mr. Bradford's, testified he was in the house with Ms. Vercher and
34 the others after the shooting. Mr. Rodgers testified that he heard
35 Mr. Perry and Mr. Williams talk about a robbery, but that Mr. Bradford was
36 not present during that discussion.

37 [T]he state presented a recorded conversation between
38 Mr. Bradford and Ms. Vercher, which took place shortly before
39 Mr. Bradford's preliminary hearing. During the call, Mr. Bradford told
40 Ms. Vercher to say "nothing about the rees-obbery":

41 Look, come to court, right come to court, ah just tell them. Cuz,
42 don't say nothing about the rees-obbery, cuz. Don't say
43 nothing about that, cuz. All right. I am tell you cuz don't
44 because that's what they got me on. That's why they are trying
45 to stick me with the hezour.

46 Ms. Vercher testified that she understood Mr. Bradford was asking her not
47 to say anything about a robbery. Mr. Bradford testified that he told her not
48 to say anything about a robbery because there had, in fact, been no robbery,
49 and the state was trying to make the fight look like one.

1 Mr. Bradford's former counsel, Sean Sullivan, also testified at trial about the
2 phone call, after counsel convinced Mr. Bradford to waive the attorney-client
3 privilege. Mr. Sullivan testified that, just before Mr. Bradford's call to Ms.
4 Vercher, he met with Mr. Bradford and "broke down" the felony murder
5 rule....

6 Ashton Parker, a jailhouse snitch who got a deal in exchange for his
7 testimony, testified about conversations he claimed he had with
8 Mr. Bradford while they were incarcerated in the same module. He testified
9 that Mr. Bradford admitted both that the crime was a robbery and that he
10 directed Mr. Williams to "smoke" Mr. Zambrano-Lopez. Mr. Parker also
11 testified that Mr. Bradford gave him a map to Ms. Vercher's house, and
12 asked him to shoot into Ms. Vercher's house to intimidate her. The state
13 admitted a copy of the map, and other evidence established that
14 Mr. Bradford's fingerprints were on the map and that it matched his
15 handwriting.

16 To counter the jailhouse informant's allegations, the defense focused
17 on his incentive for lying — a plea deal with the state involving a closed
18 conviction....

19 Although Mr. Bradford confirmed [in his testimony at trial] that
20 neither he nor the other two men tried to rob Mr. Zambrano-Lopez, and
21 testified that he had no idea Mr. Williams intended to shoot Mr. Zambrano-
22 Lopez, his testimony on collateral issues left the jury with the impression
23 that Mr. Bradford was the type of man who deserved to go to prison.

24 Trial counsel elicited an admission that Mr. Bradford had drawn
25 the map and given it to Mr. Parker. While he denied the map actually
26 directed Mr. Parker to Ms. Vercher's house, her address was written on it.
27 Likewise, while Mr. Bradford testified that he was actually giving
28 Mr. Parker directions to his ex-girlfriend's house, which was near
Ms. Vercher's, he also testified that he provided the directions so that
Mr. Parker could rob her....

.... On cross, the state elicited [evidence] that Mr. Bradford was a
gang member who earned his stripes by selling drugs for his gang. The
state also played for the jury a surveillance videotape from a 7-11 from an
unrelated case, which the state argued depicted Mr. Bradford using an ATM
card that he had stolen at gunpoint.

Second Am. Pet. at 2-5, ECF No. 67 (argument and citations to record omitted).

At Bradford's first trial in 2004, the jury found him guilty of murder with use of a
deadly weapon and attempted robbery with use of a deadly weapon. On June 3, 2004,
the trial court sentenced Bradford to two consecutive life sentences for murder with use
of a deadly weapon, with parole eligibility after twenty years, and two consecutive
sentences of six years for the attempted robbery with use of a deadly weapon, with parole
eligibility after two years, to be served concurrently with the life sentences. See J. of
Conviction Ex. 54, ECF No. 25-11.

1 Bradford appealed, and on April 18, 2006, the Nevada Supreme Court reversed
2 and remanded for a new trial, ruling that the trial court gave the jury improper instructions
3 regarding accomplice and co-conspirator liability as well as adoptive admissions. See
4 Order of Reversal and Remand Ex. 60 at 2-9, ECF No. 25-17.

5 On remand, the trial court initially reappointed Sean Sullivan as Bradford's counsel.
6 However, Sullivan notified the court that he had a conflict of interest because he was a
7 potential witness in the retrial, and he was permitted to withdraw. The court then
8 appointed another attorney, Mace Yampolsky, to represent Bradford in the retrial. See
9 Order Appointing Counsel Ex. 63 at 2, ECF No. 25-20; Tr. of Proceedings Ex. 65 at 2-15,
10 ECF No. 25-22; Tr. of Proceedings Ex. 66 at 3-4, ECF No. 25-23; Order Appointing
11 Counsel Ex. 67 at 2, ECF No. 25-24. At a pretrial hearing on July 27, 2007, Bradford
12 waived the attorney-client privilege as to the subject of Sullivan's testimony and Sullivan
13 testified; his testimony was video recorded. See Tr. of Trial Ex. 74, ECF No. 25-31.

14 Bradford's retrial commenced on July 30, 2007. See Tr. of Trial Exs. 77, ECF No.
15 26, 78, ECF No. 26-1, 82, ECF No. 27, 87, ECF No. 28, 90, ECF No. 28-3. Bradford was
16 again found guilty of murder with use of a deadly weapon and attempted robbery with use
17 of a deadly weapon. See Tr. of Trial Ex. 90 at 8, ECF No. 28-3; Verdict Ex. 94 at 2-3, ECF
18 No. 28-7. He was again sentenced to two consecutive life sentences for murder with use
19 of a deadly weapon, with parole eligibility after twenty years, and two consecutive
20 sentences of six years in prison for the attempted robbery with use of a deadly weapon,
21 with parole eligibility after two years, to be served concurrently with the life sentences.
22 See Tr. of Sentencing Hr'g Ex. 100 at 5, ECF No. 28-13; Am. J. of Conviction Ex. 102 at
23 2-4, ECF No. 28-15.

24 Bradford appealed from the amended judgment, and the Nevada Supreme Court
25 affirmed on June 30, 2009. See Order of Affirmance Ex. 111 at 2-12, ECF No. 29-4.
26 Bradford filed a petition for rehearing and a petition for en banc reconsideration, both of
27 which were denied. See Order Denying Rehearing Ex. 113 at 2 (ECF No. 29-6); Order
28 Den. En Banc Recons. Ex. 115 at 2, ECF No. 29-8.

1 Bradford then filed a Petition for Writ of Habeas Corpus in state district court. See
2 Pet. for Writ of Habeas Corpus (Post Conviction) Ex. 123, ECF No. 29-18. The state
3 district court denied that petition on May 13, 2011. See Findings of Fact, Conclusions of
4 Law and Order Ex. 127 at 3-9, ECF No. 29-22. Bradford appealed, and the Nevada
5 Supreme Court affirmed on July 23, 2013. See Order of Affirmance Ex. 154 at 2-6, ECF
6 No. 34.

7 On May 4, 2012, Bradford filed a second Petition for Writ of Habeas Corpus in the
8 state district court. See Pet. for Writ of Habeas Corpus (Post-Conviction) Ex. 138, ECF
9 No. 30-3. The state district court dismissed that petition on July 30, 2012, upon a motion
10 by the State, ruling Bradford's claims to be time-barred and successive. See Order
11 Grant'g. State's Resp. and Mot. to Dismiss Def.'s Pet. for Writ of Habeas Corpus (Post-
12 Conviction) Ex. 141 at 2-3, ECF No. 31-2. Bradford appealed, and the Nevada Supreme
13 Court affirmed on October 16, 2014. See Order of Affirmance Ex. 174 at 2-6, ECF No.
14 42-3. Bradford filed a petition for rehearing, which was denied. See Order Den. Reh'g Ex.
15 186 at 2-3, ECF No. 62-4.

16 This Court received Bradford's federal Petition for Writ of Habeas Corpus initiating
17 this action on September 27, 2013. ECF No. 1. On December 3, 2013, the Court
18 appointed the Federal Public Defender to represent Bradford. See ECF No. 16. With
19 counsel, Bradford filed an amended habeas petition on August 12, 2014. ECF No. 22. On
20 March 31, 2015, this action was stayed upon a motion by Bradford pending further
21 proceedings in state court. ECF No. 53.

22 Bradford filed a third state-court habeas petition on August 29, 2014. See Pet. for
23 Writ of Habeas Corpus (Post-Conviction) Ex. 172, ECF No. 42-1. The state district court
24 dismissed that petition on March 25, 2015 upon a motion by the State, ruling Bradford's
25 claims to be time-barred. See Findings of Fact, Conclusions of Law and Order Ex. 189 at
26 2-9, ECF No. 62-7. Bradford appealed, and the Nevada Court of Appeals affirmed on July
27 27, 2016. See Order of Affirmance Ex. 197 at 2-8, ECF No. 62-15.

1 The stay of this action was lifted on January 13, 2017, ECF No. 66, and Bradford
2 filed a Second Amended Habeas Petition, which is the operative petition in this matter,
3 Second Am. Pet. for a Writ of Habeas Corpus, ECF No. 67. In the Second Amended
4 Petition, Bradford asserts the following grounds for relief:

5 Ground 1: Bradford's federal constitutional rights were violated because his
6 trial counsel was ineffective "for presenting inculpatory testimony from Mr.
7 Bradford's former attorney, Sean Sullivan, about a privileged conversation
8 Mr. Sullivan had with Mr. Bradford regarding the felony murder rule."

9 Ground 2: Bradford's federal constitutional rights were violated because his
10 trial counsel was ineffective "for failing to advise Mr. Bradford that he faced
11 the death penalty if he did not accept the state's plea bargain offers."

12 Ground 3: Bradford's federal constitutional rights were violated because his
13 trial counsel was ineffective for improperly advising him to testify in his own
14 defense.

15 Ground 4: Bradford's federal constitutional rights were violated because
16 "[t]he trial court improperly admitted irrelevant and prejudicial evidence that
17 Mr. Bradford was a member of the Crips gang who sold drugs to benefit his
18 gang."

19 Ground 5: Bradford's federal constitutional rights were violated because his
20 trial counsel was ineffective "for opening the door to the damaging gang
21 affiliation evidence during direct examination."

22 Ground 6: Bradford's federal constitutional rights were violated because
23 "[t]he trial court improperly admitted a videotape purportedly showing
24 Mr. Bradford using an ATM card he stole at gunpoint."

25 Ground 7: Bradford's federal constitutional rights were violated because his
26 trial counsel was ineffective "for opening the door to damaging videotape
27 evidence of an unrelated robbery during direct examination."

28 Ground 8: Bradford's federal constitutional rights were violated because
"[t]he trial court failed to provide the jury with a limiting instruction regarding
improperly admitted bad act evidence."

Ground 9: Bradford's federal constitutional rights were violated because his
trial counsel was ineffective "for failing to request a limiting instruction once
he opened the door to damaging bad act evidence."

Ground 10: Bradford's federal constitutional rights were violated because
"[t]he trial court failed to accurately describe the elements of murder with a
deadly weapon and robbery with a deadly weapon, relieving the prosecution
of its burden to prove every element of the charges beyond a reasonable
doubt."

Ground 11: Bradford's federal constitutional rights were violated because
his trial counsel was ineffective "for failing to ensure the jury received the
proper instructions regarding the meaning of 'use of deadly weapon.'"

1 Ground 12: Bradford's federal constitutional rights were violated because
2 "[t]he trial court failed to properly instruct the jury on adoptive admissions."

3 Ground 13: Bradford's federal constitutional rights were violated because
4 his trial counsel was ineffective "for failing to request an adequate
5 instruction on adoptive admissions."

6 Ground 14: Bradford's federal constitutional rights were violated because
7 his trial counsel was ineffective "for failing to request and review recordings
8 of phone calls of a key prosecution witness."

9 Ground 15: Bradford's federal constitutional rights were violated because
10 "[t]he prosecution withheld material exculpatory evidence that a state
11 [witness] received a material benefit in exchange for his testimony."

12 Ground 16: Bradford's federal constitutional rights were violated because
13 "[t]here was insufficient evidence to support Mr. Bradford's murder with a
14 deadly weapon and [attempted] robbery with a deadly weapon convictions."

15 Ground 17: Bradford's federal constitutional rights were violated as a result
16 of the "cumulative effect of the constitutional errors in his case."

17 ECF No. 67 at 14-65.

18 On September 11, 2017, the Respondents filed a Motion to Dismiss, ECF No. 73,
19 and on November 27, 2017, Bradford filed a Motion for Evidentiary Hearing, ECF No. 77.
20 The Court denied both of those motions without prejudice on April 12, 2018, determining
21 that the issues raised in the Motion to Dismiss would be better considered in conjunction
22 with the merits of Bradford's claims after Respondents filed an answer and Bradford a
23 reply. ECF No. 88.

24 The Respondents filed an answer on March 25, 2019, ECF No. 98, and Bradford
25 filed a reply on August 7, 2019, ECF No. 116. Bradford also filed a Motion for Evidentiary
26 Hearing. ECF No. 117. Respondents filed an opposition to the Motion for Evidentiary
27 Hearing, ECF No. 119, and Bradford replied, ECF No. 120.

28 III. Discussion

In Ground 2, Bradford claims that his federal constitutional rights were violated
because his trial counsel was ineffective "for failing to advise Mr. Bradford that he faced

1 the death penalty if he did not accept the state's plea bargain offers." ECF No. 67 at 23–
2 26.

3 Bradford claims that before his first trial, the State offered a plea deal whereby
4 Bradford would have pled guilty to second-degree murder with use of a deadly weapon
5 and conspiracy to commit robbery in this case, and second-degree murder with use of a
6 deadly weapon and conspiracy to commit robbery in the then-uncharged "Limongello"
7 case, and the State would recommend concurrent prison sentences of twenty years to
8 life in prison on all four crimes. See Tr. of Proceedings Ex. 49 at 5-6, ECF No. 25-6.

9 Bradford acknowledges that Sean Sullivan, the attorney who represented him at
10 his first trial, advised him to accept the State's offer, but Bradford rejected it. See id.; Decl.
11 of Julius Bradford Ex. 167 at 2, ECF No. 34-13; Decl. of Sean Sullivan Ex. 168 at 2-3,
12 ECF No. 34-14. However, Bradford claims that Sullivan did not investigate the Limongello
13 case, beyond news reports and information he received from Bradford, and did not advise
14 Bradford that if he was convicted in the this case, the State could seek the death penalty
15 in the Limongello case and use the conviction in this case as an aggravating
16 circumstance, whereby Bradford could be sentenced to death. Decl. of Julius Bradford
17 Ex. 167 at 2-3, ECF No. 34-13; Decl. of Sean Sullivan Ex. 168 at 2, ECF No. 34-14.

18 Bradford further claims that after the conviction from his first trial was reversed and
19 the case remanded for retrial, there were further plea negotiations while Sullivan was still
20 representing him, but there is no evidence indicating the terms discussed at that time,
21 and the parties ultimately "were unable to negotiate the matter." See Tr. of Proceedings
22 Ex. 66 at 3, ECF No. 25-23; Decl. of Sean Sullivan Ex. 168 at 3, ECF No. 34-14. Again,
23 Sullivan did not advise Bradford that if convicted in this case he could face a death
24 sentence in the Limongello case. ECF No. 34-14 at 3. Bradford further asserts that after
25 Mace Yampolsky replaced Sullivan as his counsel, Yampolsky did not attempt to reopen
26 plea negotiations. ECF No. 67 at 26.

27 Bradford went to trial in this case and was convicted, then later charged with the
28 Limongello murder, for which he was tried and convicted of first-degree murder. The

conviction in this case was used as an aggravating circumstance in the Limongello case, and he was sentenced to death. See Ex. 166 at 2-3, ECF No. 34-12; J. of Conviction Ex. 165 at 2-3, ECF No. 34-11. The Nevada Supreme Court subsequently reversed Bradford's conviction in the Limongello case and remanded for a new trial, and Bradford represents that the State "apparently intends to seek the death penalty at his retrial" Reply at 29, ECF No. 116.

Bradford argues that had he been advised that there was a possibility that he would be sentenced to death if he was convicted in both this case and the Limongello case, he would have accepted the plea agreement offered by the State. ECF No. 34-13 at 2; see also ECF No. 67 at 26; ECF No. 116 at 32–33.

The constitutional right to effective assistance of counsel in criminal proceedings extends to the plea-bargaining process, see Missouri v. Frye, 566 U.S. 134, 140–44 (2012); Lafler v. Cooper, 566 U.S. 156, 162 (2012), as does the Strickland standard, see Lafler, 566 U.S. at 162–63. In the context of plea bargaining, with respect to the performance prong of the *Strickland* standard, the habeas petitioner must show that his trial counsel did not adequately advise him such that he did not have "the tools he need[ed] to make an intelligent decision" regarding the plea offer. Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002). In addition, regarding the prejudice prong, the petitioner must show "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 566 U.S. at 164.

Bradford raised this claim for the first time in state court in his third state habeas action, ECF No. 67 at 23, and it was ruled procedurally barred in that action. Therefore, this claim is potentially subject to dismissal as procedurally defaulted, unless Bradford can show that some exception to the procedural default doctrine applies. Bradford argues

1 that he can show actual innocence to excuse the procedural default, and he argues that
2 he can show cause and prejudice such as to excuse the procedural default under
3 Martinez v. Ryan, 566 U.S. 1 (2012), because of ineffective assistance of his counsel in
4 his first state habeas action. ECF No. 116 at 3–16.

5 Bradford requests an evidentiary hearing on this claim. ECF No. 117 at 6–8. The
6 Court determines that an evidentiary hearing is warranted and will grant Bradford's Motion
7 for an Evidentiary Hearing with respect to Ground 2. The subject of the evidentiary hearing
8 will be the claim that Bradford's trial counsel was ineffective as to the advice provided
9 Bradford regarding the State's offer of a plea agreement. The Court does not intend for
10 this evidentiary hearing to encompass Bradford's claim of actual innocence, his claim that
11 his counsel was ineffective in his first state habeas action, or any other claim.

12 The Court will set the evidentiary hearing on Ground 2 and will set a schedule for
13 the parties to meet and confer and submit a joint proposed prehearing scheduling order.

14 The joint proposed prehearing scheduling order should set an agreed upon
15 schedule by the parties regarding necessary preparation for and exchange of information
16 in advance of the evidentiary hearing. As to any matter upon which the parties cannot
17 agree, the parties should include in the joint proposed prehearing scheduling order a
18 description of the issue and the parties' positions. After the parties submit the joint
19 proposed prehearing scheduling order, the Court will either approve the prehearing
20 scheduling order proposed by the parties or issue a different prehearing scheduling order.

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22 IV. Conclusion

23 **IT IS THEREFORE ORDERED** that Petitioner's Renewed Motion for an
24 Evidentiary Hearing (ECF No. 117) is **GRANTED IN PART AND DENIED WITHOUT**
25 **PREJUDICE IN PART**. Petitioner is granted an evidentiary hearing on Ground 2 of his
26 Second Amended Petition for Writ of Habeas Corpus as discussed *supra*; in all other
27 respects, the motion is denied without prejudice. The Court will revisit the Motion for
28 Evidentiary Hearing when addressing Bradford's other claims; the parties need not file

1 any further motion or briefing regarding Petitioner's request for an evidentiary hearing on
2 his other claims.

3 **IT IS FURTHER ORDERED** that the evidentiary hearing granted in this order will
4 be scheduled to begin on August 4, 2020 at 9:30 AM **by videoconference** at the
5 Las Vegas Courtroom 7C, courtroom of the undersigned United States District Judge.

6 **IT IS FURTHER ORDERED** that counsel for Petitioner and counsel
7 for Respondents are to meet and confer regarding the terms of a prehearing scheduling
8 order and within thirty (30) days from the date of this order, file a joint proposed
9 prehearing scheduling order, as described above. The Court will not look favorably
10 upon any motion to extend the schedule for the filing of the joint proposed prehearing
11 scheduling order.

12 DATED this 27th day of May, 2020.

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15 _____
16 RICHARD F. BOULWARE, II
17 UNITED STATES DISTRICT JUDGE
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